RECEIVED

Nov 07 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2019-000451
Published Opinion No. 5934 (S.C. Ct. App. Filed August 10, 2022)

Nicole Lampo, ... Petitioner

v.

Amedisys Holding, LLC, and Leisa Victoria Neasbitt, ...Respondents

---

REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

J. Paul Porter (#100723)
Cromer Babb Porter & Hicks, LLC
1418 Laurel Street, Suite A
Post Office Box 11675
Columbia, South Carolina 29211
Phone 803-799-9530
Facsimile 803-799-9533
Attorneys for Petitioner

Other Counsel of Record:

George A. Reeves, III
FISHER & PHILLIPS, LLP
1320 Main Street, Suite 750
Columbia, South Carolina 29201
greeves@fisherphillips.com
Attorney Amedisys Holing, LLC and
Leisa Victoria Neasbitt

Jason D. Keck
FISHER & PHILLIPS, LLP
10 South Wacker Drive, Suite 3450
Chicago, Illinois 60606
jkeck@fisherphillips.com
Attorney for Amedisys Holding, LLC and
Leisa Victoria Neasbitt

TABLE OF CONTENTS

INTRODUCTION

The Respondents reframe the questions before the Court in a way that blurs the unorthodox way a contract was supposedly formed in this case. This approach glosses over the real problem in this case, that there is no manifestation of assent or acceptance by the Petitioner of the Respondent Amedisys' contract to arbitrate.

Petitioner never signed the contract to arbitrate and there is no evidence that she even reviewed it. The evidence Respondent relies on to establish acceptance is that the Petitioner received a pop-up "Acknowledgment" saying she was being "given access to [] Arbitration Program materials." (J.A. 54). That pop-up then said unless she "opt[ed] out" "within 30 days" she would be bound. The real questions before the court are: (1) can you create a contract this way? and (2) can you create a contract this way as a matter of law?

The Circuit Court distilled this question in contract law terms as follows: "the legal question is whether or not [] failure to reject an offer is acceptance?" (J.A. pp. 157:1-4) (Omission for clarity). Common sense answers that question "no," and the law should follow. There is no governing precedent that says a contract can be formed in this way. Respondents' principal suggestion on return – that there is nothing novel about these issues – is a stretch.

ARGUMENT

Respondents argue there is no novel issue for the Court to consider under Rule 242(b)(1).

The Court of Appeals' opinion says that its decision in this case was supported by its prior holding in the case *Towles v. United HealthCare Corp.* 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999). However, there are three key differences between this case and *Towles* and two of those distinctions were overlooked by the Court of Appeals opinion.[1] (Petition at pp. 6-8). There is no case,

[1] The three distinguishing factors between *Towles* in this case are: (1) the facts surrounding the way the arbitration acknowledgements and agreements were presented; (2) the comparative descriptiveness of

applying South Carolina contract law, which supports a finding of contract formation, acceptance in particular, on facts like this. The questions: (1) Whether you can form a contract in the way asserted here? And (2) Whether you can do so as a matter of law, without a fact finding? are most certainly novel questions.

I. ACCEPTANCE BASED ON A FAILURE TO REJECT IS NOVEL.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). "A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'" *Sauner*, 581 S.E.2d at 166; *quoting, Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993). These well-established principles are not novel, but the question of whether an offeror of a contract can bind an offeree to a contract by making an offer that imposes a 30-day duty to "opt-out" is a novel question. Respondents' return glosses over this novelty by suggesting that the Court of Appeals' decision was in line with its prior decision in *Towles v. United HealthCare Corp.* These facts and the facts in *Towles* are markedly different. Respondent fails to understand these distinctions on Return.

First, the Respondents overstep one of the principal distinguishing factors between this case and *Towles* by arguing that this is a unilateral contract which was formed by the employees "actual notice of an arbitration policy" and continuation of work thereafter. However, the purported agreement in this case is a bilateral agreement that is expressly not conditioned on continued employment. *Lampo v. Amedisys Holding, LLC*, Op. NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 72) ("To be sure, Amedisys did not mandate arbitration as a condition of

---

the acknowledgement forms; and (3) that agreeing to arbitration was a condition of continued employment in *Towles*. The Court of Appeals only addressed the first distinguishing factor.

employment."). That ascending to the agreement in this case was not a condition of continued employment directly distinguishes this case from the Court of Appeals previous reasoning in *Towles*:

> We find the Acknowledgment constituted a specific communication of an offer which conditioned Towle's continued employment on his acceptance of the Employment Arbitration Policy as part of his employment contract.

Towles, 338 S.C. 29, 40, 524 S.E.2d 839, 845. Respondent cannot say that Petitioner "manifested her assent"' by continued employment when ascending to the agreement in this case was not a condition of continued employment. (Return p. 10) (Arguing Petitioner "manifested her assent" by "continu[ing] [] work[]."). The cases cited by Respondents where continued employment was conditioned on agreeing to an arbitration agreement have little to do with the issue here. *See e.g. Hightower v. GMRI, Inc.*, 272 F.3d 239, 243 (4th Cir. 2001) ("Thus, he had actual notice of the DRP and knew that his assent to the DRP was a condition of continued employment with GMRI.").

Next, Respondents minimize the descriptiveness of the acknowledgment in *Towles*, suggesting that it "merely referenced an 'Employment Arbitration Policy' found in the Company's Handbook." (Return pp. 7-8). The signed acknowledgment in *Towles* was compendious; it described all of the material terms of the arbitration agreement and served as an agreement to arbitrate by itself:

> I understand that arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim. I agree to submit all employment related disputes based on a legal claim to arbitration under [United's] policy."

(*Towles*, 338 S.C. 29, 39, 524 S.E.2d 839, 845). The above, when compared to the acknowledgement in this case which really only "merely reference[d]" the Amedisys's arbitration policy/proposed agreement, highlights why this is a novel situation and why the Court of Appeals decision in *Towles* is not determinative. *See, Hubner v. Cutthroat Commc'ns, Inc.*, 2003 MT 333, ¶ 23, 318 Mont. 421, 430, 80 P.3d 1256, 1262 (2003); *distinguishing Towles*, 524 S.E. 2d 839 ("Unlike Cutthroat's language, this language [in *Towles*] made clear to the signing employee what they were agreeing to by signing the handbook.").

Respondents draw attention to the novelty of this issue in their efforts to suggest that there is no novelty. Respondents argue Petitioner had a an "obligation to review the Arbitration Agreement." (Return p. 9). That argument relies on a conclusion that its pop-up acknowledgment created a legal duty to read a separate document and either opt-out or be bound by the obligations contained in that separate document. Yet, Respondents cannot cite to any legal authority for this proposition. In this context, which is meaningfully different from the facts in *Towles*, Respondents are saying that an offeror can impose a duty on an offeree to read and reject an offer. That is not how acceptance works. *Sauner*, 581 S.E.2d at 166 ("A valid offer 'identifies the bargained for exchange and creates a power of acceptance in the offeree.'").

Respondents' attempt to relate this case to authority about the general duty to read a contract misses the mark; a party has a legal duty to read a contract that they accept, but there is no authority imposing a legal duty on a party to read a contract that they did not accept. (Return pp. 9-10) (*citing, Mid-Continent Refrigerator Co., v. Dean,* 256 S.C. 99, 180 S.E.2d 892 (1971)). Cases about the "duty to read" are irrelevant to this case where the issue is whether or not the Petitioner accepted an offer, in the first place. *See, Mid-Continent Refrigerator Co.* 180 S.E.2d at 893 ("It is uncontested that the contract was signed and properly executed. Dean asserts that he did not read it.").

In this case, the only evidence of acceptance is that Petitioner clicked "Acknowledge" (not agree) on a click-wrap pop-up acknowledgement that said she would be "given access" to Respondent Amedisys's "Arbitration Program Materials." That pop-up is best viewed as the communication of an offer. Finding an acceptance here suggests that an offer can contain a contractual obligation to read it and opt-out of a proposed adhesion agreement or otherwise be bound. That is a worrisome suggestion particularly in the consumer and employment contexts. This problem was illustrated by the following exchange before the Circuit Court:

THE COURT: So you're saying by not opting out she accepted.

> MR. REEVES: That is exactly what I was leading into is that by, by acknowledging it, and which we can show through the system that she acknowledged, and –
>
> THE COURT: But I mean, is that contract law? If I offer you to sell my house and you tell – and I say, "You don't contact me back and tell me you don't want to do it." Then we've got a contract and you got to buy my house?

(J.A. 155:23-156:6). The novel problem before this Court, in the first instance, is that the Respondents' position and the Court of Appeals' decision inherently allow for contract formation, as a matter of law, without a power of acceptance (or rejection) on the part of the offeree.

II. THERE IS NO PRECEDENT SUGGESTING A CONTRACT CAN BE FORMED IN THIS WAY, ON THESE FACTS, ESPECIALLY WITHOUT A FACT FINDING.

The Federal Arbitration Act says that where the making of a contract is at issue and a jury trial has been demanded, before arbitration can be compelled, a jury trial must be held on whether a contract to arbitrate has been formed. 9 U.S.C. § 4. ("If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."). South Carolina contract law recognizes that fact issues underlying contract formation should be decided by a jury. *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) ("A trial court should submit to the jury the issue involving the existence of a contract where its existence is questioned and the evidence is either conflicting or admits of more than one inference."); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law.") *Lampo v. Amedisys Holding, LLC*, *Op.* NO. 5934 (S.C. Ct. App. filed Aug 10, 2022) (Howard Adv. Sh. No. 28 at 71) ("Usually, the question of whether an employee has received actual notice is for the jury[.]"). Even if a contract can be formed in the way suggested by the Respondents, recognizing contract formation as a matter of law, on facts like this, would be unprecedented.

Respondent, on whether the fact issues regarding contract formation in this case should have been decided by a jury, again cites to "duty to read" law. (Return p. 12); *citing, Mid-Continent Refrigerator*, 256 S.C. 99, 100, 180 S.E.2d 892, 893 (1971); *and, Hamlin v. Dollar Tree Stores, Inc.*, No. 2:17-CV-2648-PMD 2017 WL 6034325 (D.S.C. Dec. 6, 2017). This authority, about the duty to read an agreement a party has signed, has no bearing where the fact question is whether a party signed or assented to an agreement in the first place.[2]

If a contract can be formed this way, then there are at least fact issues on whether the Petitioner accepted Respondent's offer to contract and had actual notice of that offer and the underlying arbitration agreement. Respondents have not cited to a single governing case where a contract was formed this way. Respondents' suggestion that these are not novel issues is unreasonable.

CONCLUSION

Petitioner Nicole Lampo therefore respectfully asks this Honorable Court to grant her Writ of Certiorari and ultimately reverse the holding of the Court of Appeals and remand this case for the reasons discussed above.

[2] The District Court case Respondents cite shows this disconnect. *Hamlin*, 2017 WL 6034325 at *1 ("First, Dollar Tree has presented evidence that Hamlin digitally signed the arbitration agreement using a digital signature that only she was capable of entering. Second, Hamlin admits that she signed the agreement in various places in her brief.").

Respectfully Submitted,

J. Paul Porter, Esquire (#100723)
CROMER, BABB, PORTER & HICKS, LLC
1418 Laurel Street
Post Office Box 11675
Columbia, South Carolina 29211
Phone: (803) 799-9530
Fax: (803) 799-9533
Attorneys for Appellant

Columbia, South Carolina
November 7, 2022